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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 713

EUGENE JAMES ALLEGRUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is reported at 309 F. 2d 934.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1962. The petition for a writ of certiorari was not filed until January 2, 1963, and was out of time under Rule 22(2) of the Rules of this Court. On January 9, 1963, in response to a motion by petitioner, the court of appeals granted leave to file a petition for rehearing out of time. This petition was filed on January 11, 1963 and denied by the court of appeals on February 4, 1963. A supplement to the petition for a writ of certiorari, advising this

Court of the petition for rehearing and its denial, was filed on Febr ry 9, 1963.[1] The jurisdiction of this Court is in oked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether refusal by the trial judge to allow petitioner's attorney to examine a written statement made by a government agent was harmless error where the testimony of the agent and the contents of the statement were nearly identical.

STATEMENT

Petitioner was tried before a jury in the District Court for the Middle District of Pennsylvania and found guilty of possessing a movie projector and two cameras, knowing them to have been stolen, in violation of 18 U.S.C. 659. *United States* v. *Allegrucci*, 157 F. Supp. 142 (M.D. Pa. 1957). On appeal, the court of appeals ordered a new trial on the ground that the judge had erred in his instructions to the jury. *United States* v. *Allegrucci*, 258 F. 2d 70 (C.A.

[1] Petitioner admits (Motion For Leave to File Rehearing Petition Out of Time, p. 3) that the sole purpose of the petition was to obtain an extension of time and correct the error caused by the late filing of his petition for a writ of certiorari. In *Wayne Gas Co.* v. *Owens Co.*, 300 U.S. 131, 137, this Court stated that where a court of appeals grants a rehearing out of time for the sole purpose of making timely an appeal that would otherwise be untimely, the appeal must be dismissed. Cf. *Dep't of Banking* v. *Pink*, 317 U.S. 264; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144. The rationale of these cases would seem to be applicable here where the citation of Rule 22(2) in the petition for a writ of certiorari shows that petitioner was aware of the time limitations of the rules and where the stated purpose of the rehearing was merely to obtain an extension of that time.

3). At the new trial, petitioner was again found guilty. On appeal, the court of appeals overruled petitioner's claims of error, but vacated the judgment and remanded the cause for resentencing on the ground that petitioner had not been afforded an opportunity to speak in his own behalf before sentencing. *United States* v. *Allegrucci*, 299 F. 2d 811 (C.A. 3). The district court resentenced petitioner to two eighteen-month concurrent terms of imprisonment, and the court of appeals affirmed, 309 F. 2d 934.

The evidence, which is summarized at 258 F. 2d 70, was essentially the same at both trials. Briefly, it showed that the projector and cameras which were the subject of the indictment had been picked up by Railway Express in New York for shipment out of state and had been taken to a terminal in New York and placed on a platform from which they disappeared. The three cameras were eventually purchased by a wholesale supplier in Scranton, Pennsylvania, who testified that he obtained them through a man named Gull. Gull testified that he had obtained the items from petitioner, who had asked him to find a buyer for the cameras and had paid him five or ten dollars for each sale. The government called as a witness an agent of the F.B.I., who testified about an interview he had with the petitioner in which the petitioner denied that he had anything to do with the sale of the goods by Gull (R. 100a–101a). On cross-examination, the agent disclosed that he had made a memorandum of this interview. Petitioner's counsel demanded the report under 18 U.S.C. 3500.

The court, after an examination of the document, refused to turn it over (R. 102a, 108–109a).

ARGUMENT

The second trial in this case took place in 1959, before this Court's decision in *Clancy* v. *United States*, 365 U.S. 312, clarified an issue that had long troubled the lower courts, *i.e.*, whether a memorandum prepared by a government agent had to be produced under 18 U.S.C. 3500 if the agent testified concerning the interview that was the subject of the memorandum. The court of appeals recognized that the trial court had erred in this case in failing to turn over such a report to the defense, but held that in the circumstances of this case the error was harmless since the substance of the agent's testimony and the report (set out together as Appendix III of the court's opinion, 299 F. 2d 811, 819) were almost identical. Since this Court has already ruled that the harmless error doctrine may properly be applied to failure to comply with the requirements of 18 U.S.C. 3500 (*Killian* v. *United States*, 368 U.S. 231, 243–244; *Rosenberg* v. *United States*, 360 U.S. 367), the decision below represents merely the application of settled principles to the facts of this case. In light of the fact that both the testimony and the report of the agent showed that, during the interview, petitioner denied having anything to do with the sale of the cameras by Gull, the ruling of the court below was fully justified.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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